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NO. 84-670

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JUDITH SCHMERTZ and BARBARA JOSEPHER,

Petitioners,

v.

NASSAU COUNTY BOARD OF SUPERVISORS, THOMAS GULOTTA, as Presiding Supervisor of Town of Hempstead, JAMES BENNETT, as Supervisor of Town of Hempstead, JOHN KIERNAN, as Supervisior of Town of North Hempstead, HANNAH KOMANOFF, as Supervisor of City of Long Beach, JOSEPH COLBY, as Supervisor of the Town of Oyster Bay, and VINCENT A. SUOZZI, as Mayor-Supervisor of City of Glen Cove,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether, as the court below held, plaintiffs' claim that the 1980 census-based reapportionment of voting power among members of the defendant Board is excessively disproportionate to the population represented by certain members is foreclosed by this Court's summary dismissal of an appeal from the judgment in a prior state court action holding constitutional the same Board's use of the same weighted voting system, with a substantially greater deviation, under an apportionment based on the 1970 census?

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Statement of the Case

In *Franklin* v. *Krause,* 32 N.Y.2d 234, 298 N.E.2d 68 (1973), New York's Court of Appeals upheld a modified weighted voting system adopted by the Nassau County Board of Supervisors, that county's legislative body, on the basis of the 1970 decennial census in the face of a constitutional attack grounded upon the very same contentions raised by plaintiffs in this action. This Court dismissed the appeal as of right from that determination for want of a substantial federal question (*Franklin* v. *Krause,* 415 U.S. 904, 39 L.Ed.2d 461, 94 S. Ct. 1397 [1974]).

While the present action ostensibly attacks the local law reapportioning the Board's weighted votes on the basis of the 1980 census, plaintiffs' claims herein were not directed at any new feature of the plan or at the changes made necessary by the slight decline in the county's overall population and by the redistribution of that population among the constituent town and cities revealed in the 1980 census. Rather, plaintiffs herein have claimed only that the newer plan continues to utilize the same weighted voting system and continues to allocate votes on the basis of what they contend is a mathematically erroneous and, therefore, constitutionally defective basis.

In fact, it is not disputed that the current plan based on the 1980 census deviates to a substantially lesser degree from the ideal than did the one, based on the 1970 census, which was held constitutional in *Franklin* v. *Krause, supra.*

Set forth in the opinion of the Court of Appeals for the Second Circuit (737 F.2d 155, 157-158; Appendix A to Petition for a Writ of Certiorari at A-6 to A-7) are the prior plan, the 1970 census counts for the County and

its constituent municipalities, the number of votes allocated to each member of the legislative body and a table computing the resultant deviation between the percentage of population represented by each legislator and the percentage of that legislator's "voting power" (i.e., the percentage of all mathematically possible voting combinations within the legislature in which that legislator's vote would be the decisive one).

Using the very same computations, the New York Court of Appeals in *Franklin* v. *Krause*, 32 N.Y.2d 234, 298 N.E. 2d 68 (1973), held that the 1970 census-based weighted voting plan utilized by the Board did not violate the "one person, one vote" principle.

Most significantly, that Court found that the "range of deviation" under the 1970 census-based plan was 7.3%, which it determined by combining the deviation (3.5%) of the most under-represented municipality (North Hempstead) and that (3.8%) of the most over-represented one (Glen Cove).

Also set forth in the opinion of the Court below (737 F.2d at 159-160; Petitioners' Appendix A at A-10 to A-11) are the current plan, underlying 1980 census data and a similar analysis and computation of the current deviation between percentage of population represented and percentage of voting power for each legislator.

The maximum "range of deviation" under the current plan—measured in exactly the same method as in *Franklin* v. *Krause*—is 5.26%, the combination of Long Beach's legislative overrepresentation (3.19%) and Hempstead's legislative underrepresentation (2.07%). Moreover, as the Court below noted, "[T]hat diminished disparity and the numerical vote allotment are the *only* differences" (737 F.2d 155, 160; Petitioners' Appendix A, A-11; emphasis in original) between the 1970 census-based plan upheld in *Franklin* v. *Krause, supra,* and the 1980 census-based plan attacked in the instant action.

REASONS FOR DENYING THE WRIT

I. The Court below fully considered the issues and correctly determined that the question plaintiffs would present for review is controlled by this Court's summary dismissal of the appeal in *Franklin* v. *Krause*.

Throughout this litigation, plaintiffs' basic contention has been that in *Franklin* v. *Krause*, 32 N.Y.2d 234, 298 N.E.2d 68 (1973), the New York Court of Appeals made a "fundamental mathematical error" in "mixing percentage points and percentages" which "is now being repeated" in the 1980 census-based plan. That alleged error was the failure to divide the "deviation" measured for each Supervisor-legislator by the percentage of County population represented to find what plaintiffs below called the "percentage discrepancy." Had that division been performed, plaintiffs urged, the deviation under the 1970 census-based plan would have been stated as 232%, rather than 7.3%, and under the current plan as 132.16%, rather than 5.26%.

As in their petition to this Court (p. 17), plaintiffs claimed below that this mathematical error was not discovered until after this Court's dismissal of the appeal in *Franklin* v. *Krause*, 415 U.S. 904, 39 L.Ed.2d 461, 94 S.Ct. 1397 (1974). Consequently, they claim, since the method of calculating the 7.3% deviation was not explicitly offered as one of the "Questions Presented" in the Jurisdictional Statement filed by plaintiffs on that appeal, this Court's summary dismissal is not a binding precedent on that issue.

The extensive and clear exposition by the Court below in support of its conclusion that the computation of the 7.3% deviation in *Franklin* v. *Krause* was within the "reach and content" (*Hicks* v. *Miranda*, 422 U.S. 332, 345

n. 14 [1975]) of the summary dismissal in *Franklin* v. *Krause* (see 737 F.2d 155, 168-172; Appendix to Petition, at A-31 to A-39) need not be repeated herein.

It should also be noted, however, that contrary to the assertion repeated in the Petition (p. 17) that the alleged "mathematical error" was not discovered until after this Court's dismissal and that the "proper" method of measuring was not raised in the *Franklin* v. *Krause* litigation, the very same percentages which plaintiffs derive from their method of computation were presented to the courts throughout the *Franklin* v. *Krause* suit. The lower court decision therein, reversed by the New York Court of Appeals, utilized the very method plaintiffs herein claim was erroneously overlooked by the Court of Appeals and expressly relied on the percentages thus computed to find the prior plan unconstitutional (72 Misc.2d 104, 107, 338 N.Y.S.2d 561, 565 [1972]). Moreover, the plaintiffs in *Franklin* v. *Krause* argued in their brief to the Court of Appeals on the basis of the same method of calculation and percentages urged by plaintiffs herein. (See appendix hereto, excerpt of Plaintiffs-Respondents' Brief to Court of Appeals in *Franklin* v. *Krause,* particularly the footnote on p. 2 thereof).

In truth, then, the numbers argument is nothing new and this action was and is merely the latest effort to reargue and relitigate issues raised in *Franklin* v. *Krause,* an effort also made and rejected on stare decisis grounds in the state courts (*Bechtel* v. *Board of Supervisors,* 54 N.Y.2d 674, 425 N.E.2d 897 [1981]).

Plaintiffs' attempt to limit the preclusive effect in this action of the summary dismissal in *Franklin* v. *Krause* to the specific challenges presented in the Jurisdictional Statement therein also misses the mark by ignoring the basic principle that a summary dismissal for want of a substantial federal question, whatever the limitations on

its precedential value in other cases, is an affirmance on the merits of the state court judgment.

The state court judgment in *Franklin* v. *Krause* necessarily rested upon the finding that the deviation between Board members' voting power and the percentages of population represented was not substantial enough to violate the Equal Protection Clause. That issue was at the heart of the state court litigation.

The instant case involves the same local legislature using the same weighted voting system. The only difference is that the deviation is significantly less, however mathematically measured and stated, than it was under the prior constitutional plan. Most significantly, the plaintiffs profess to represent the same aggrieved interest as did the plaintiffs in the prior action and mount the same claim of invalidity. Any judgment herein upholding plaintiffs' contention in this respect would necessarily contradict the state court judgment of constitutionally affirmed by this Court in *Franklin* v. *Krause*. Any such judgment is, therefore, clearly barred by that affirmance.

Thus, the cases relied on by plaintiffs in which this Court found itself not bound by a prior summary affirmance in subsequent actions initiated by parties claiming different interests and voicing distinct constitutional challenges to the same statute (*Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 59 L.Ed. 2d 230, 99 S. Ct. 983 [1979]), or challenging different features of similar statutes in different states (*Mandel* v. *Bradley*, 432 U.S. 173, 53 L.Ed.2d 199, 97 S. Ct. 2238 [1977]; *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 69 L.Ed2d 800, 101 S. Ct. 2882 [1981]) are not in point. This is not, in reality, a case *like Franklin* v. *Krause*. This is, in reality, the *same* case and the result herein should not be different merely because the names of the plaintiffs have changed.

II. There is no conflict between the decision of the Court below and this Court's summary affirmance in *Franklin* v. *Krause*, on the one hand, and other reapportionment decisions of this Court on the other.

This Court has consistently recognized and frequently stated that, with respect to local legislative bodies, the Equal Protection Clause permits much greater flexibility and much more substantial departures from absolute numerical equality of representation than is the case with a state and, even more so, the national legislature. Compare, for example, *Brown* v. *Thomson,* U.S. , 77 L.Ed.2d 214, 103 S. Ct. 2690 (1983), holding constitutional a state legislature apportionment plan with a maximum deviation of 89% and *Karcher* v. *Daggett,* U.S. , 77 L.Ed.2d 133, 103 S. Ct. 2653 (1983), holding unconstitutional a reapportionment plan for congressional districts with a maximum deviation of less than 1%. In *Karcher,* the Court expressly noted that "[W]e have required that absolute population equality be the paramount objective of apportionment only in the case of congressional districts for which the command of Art. I, § 2 * * * outweighs the local interests that a State may deem relevant in apportioning districts for * * * state and local legislatures" (77 L.Ed.2d at 142, 103 S. Ct. at 2659).

Contrary to plaintiffs' repeated assertions, none of the legion of Supreme Court cases dealing with State and local reapportionment disputes has ever announced a prescribed mathematical formula for testing compliance of State and local legislatures with the mandate of Equal Protection. Rather, the Court has always recognized that there is no mathematical formula embodied in the Equal Protection Clause and that other policies and factors, such as the desire to maintain the integrity of political subdivisions, the obvious and established motivation for the use

of weighted voting in Nassau County (see *Franklin* v. *Krause,* 32 N.Y.2d 234, 238-239, 298 N.E.2d 68, 70) are legitimate and constitutional considerations. See e.g., *Abate* v. *Mundt,* 403 U.S. 182, 185-187, 29 L.Ed.2d 399, 402-403, 91 S. Ct. 1904, 1906-1907 (1971); *Mahan* v. *Howell,* 410 U.S. 315, 329, 35 L.Ed.2d 320, 333, 93 S. Ct. 979, 987 (1973); *Gaffney* v. *Cummings,* 412 U.S. 735, 748-749, 37 L.Ed.2d 298, 309-310, 93 S. Ct. 2321, 2329-2330 (1973).

It is relevant to note that plaintiffs in their Petition to this Court have abandoned the contention made below (see 737 F.2d at 167; Petitioners' Appendix A, at A-27 to A-28) that the use of weighted voting by the defendant Board is *per se* unconstitutional. Thus, they have, at least implicitly, acknowledged that that issue, which was the first of the "Questions Presented" in the Jurisdictional Statement filed with this Court in *Franklin* v. *Krause,* is foreclosed by the summary dismissal of that appeal.

Yet, in reality, their attempt to argue mathematical formulae is only an indirect attack upon the use of weighted voting itself. (Note, in this connection, the final paragraph of Point I in the Petition, p. 15).

The use of weighted voting by Nassau County's legislative body being clearly and, apparently, concededly constitutional and the County's population being distributed among its towns and cities as it is, allocation of the weighted votes on the basis of a computer analysis of "voting power" rather than by giving each Supervisor a fraction of the votes corresponding to his municipality's proportion of County population is the only meaningful method for apportioning the Board's votes. If the latter method were used, the two Hempstead Supervisors would be the county legislature and residents of the other munci-

palities would be effectively and completely disenfranchised. See *Iannucci* v. *Board of Supervisors,* 20 N.Y.2d 244, 252, 229 N.E.2d 195, 199 (1967).

Using the "voting power" method gives each Supervisor legislative power that substantially corresponds to the number of residents he represents. With all the charts, percentage calculations, mathematical equations, and self-created terms (*e.g.,* "Absolute Difference" and "percentage deviations"; Petition, pp. 7-8) plaintiffs have presented, they have never disputed—and they cannot dispute—that the present apportionment of weighted votes among Board members distributes its "voting power" *as close as is mathematically possible* to the percentage of population each Supervisor represents.

Parenthetically, it is observed that the Petition (pp. 8-11 and "Table I") attempts a bootstrap argument based on self-serving and unsubstantiated observations comparing the reports of computer experts, including the one employed by Nassau County, to other New York county legislative bodies. The primary case cited by plaintiffs in this connection is *English* v. *Lefever,* 94 A.D.2d 755, 462 N.Y.S.2d 695 (1983), in which the Petition (p. 9) claims that the Appellate Division invalidated the reapportionment plan of Rockland County "because the plan had a deviation of 37.15% [but that] This plan would not have been struck down had the Court used the measure used by the New York courts in *Franklin* v. *Krause* and in the court below."

However, the Court's memorandum decision in that case clearly puts its holding on different grounds and most pointedly notes that "[U]nlike the proponents of the Nassau County plan in *Franklin* v. *Krause* [citations omitted] the defendants here have failed to establish that their plan has no practical alternatives. *Absent such*

proof, the 37.15% discrepancy was properly held to be grossly excessive." (94 A.D.2d at 756, 462 N.Y.S.2d at 696; emphasis added).

In any event, as noted above, the plan involved herein is the closest mathematical equality possible while preserving the integrity of Nassau County's political subdivisions and their historic role in county goverment. This Court's many reapportionment decisions, including but not limited to *Franklin* v. *Krause,* make it clear that more is not required, and the decision of the Court below fully accords with those decisions.

III. The issue raised by the Petition does not warrant certiorari review by this Court.

It is certainly at least as true and as significant today as it was when stated by then Chief Judge Taft in 1923 that certiorari jurisdiction is not designed "merely to give the defeated party in the Circuit Court of Appeals another hearing" (*Magnum City* v. *Coty,* 262 U.S. 159, 163).

It is respectfully submitted that consideration of the Petition itself and the foregoing discussion demonstrate that no meritorious reason for granting certiorari is presented herein. There is no showing of a conflict in decisions between the Circuit Courts of Appeal or between the decision of the Court of Appeals herein and any decisions of this Court. There has been no departure from the accepted and usual course of judicial proceedings. There is not presented a novel, important question which is likely to recur and which has not been, but should be, settled by this Court. (See, generally, Rule 17 of the Rules of this Court).

What is presented, again, is the apportionment of weighted votes in a single county legislature (Petition,

p.8), by a method in use in that County for several years during which it has been repeatedly sanctioned by the courts, including this Court.

The Court has obviously had several, recent occasions to speak with respect to the requirements of Equal Protection in state and local reapportionment cases and nothing in the instant case suggests the need for, or this case's worthiness as a vehicle for, further pronouncements or clarification on that subject.

In short, the applicable law is well settled and, in its opinion unanimously affirming the District Court's grant of summary judgment to defendants, the Court of Appeals thoroughly considered all of plaintiffs' contentions and correctly applied the well settled law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Excerpt from Plaintiffs-Respondents' Brief to New York Court of Appeals in *Franklin* v. *Krause*

The following table demonstrates the fatal defects in the distribution of "voting power" in the "new" plan, based upon the 1970 federal census figures set forth in Appendix A to this brief.:

Supervisor	% of 1970 Population	% of Voting Power
Presiding Supervisor, Hempstead	28.135	27.777
Supervisor, Hempstead	28.135	27.777
(Hempstead total)	(56.271)	(55.555)
Supervisor, Oyster Bay	23.131	20.370
Supervisor, North Hempstead	16.458	12.963
Supervisor, Long Beach	3.328	5.555
Supervisor, Glen Cove	1.811	5.555

Even a cursory observation of these figures demonstrates that the City of Glen Cove (5.555% of the voting power) is given a quantum of voting power more than three times greater than its share of the population (1.811%) while each of the three towns is given voting power less than its proportionate share of the population. Further, the City of Long Beach, with a population more than 33% greater than that of the City of Glen Cove, is allocated precisely the same percentage of voting power. Similarly, the Town of North Hempstead, which is entitled by population to 16.458% of the decisive vote, is deprived of 21.2% of the power to which it is entitled, and the Town of Oyster Bay is deprived of 11.9% of the

Excerpt from Plaintiffs-Respondents' Brief to New York Court of Appeals in Franklin v. Krause

23.131% of decisive votes to which it is constitutionally entitled.*

Whether or not this resulting disparity is intended to improve the legislative lot of the two smallest represented municipalities, as contended by appellants, is not determinative of the constitutional issues involved. As the majority may not transcend the constitutional rights of the minority to equal protection of the laws, neither may the minority be given overprotection at the expense of the remaining populace. The argument urged by appellants to sustain the imbalance inherent in their "new" system should not be permitted to validate a plan of inequality. Neither should the plan be sustained on the appellants' explanation that it preserves political representation from the two.

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* With respect to North Hempstead, 21.2% is arrived at by subtracting 12.963% from 16.458% to which it is entitled. This yields a difference of 3.495% which, when divided by 16.453 results in a 21.2% loss of power entitlement to that town. By a similar process, it is determined that the Town of Oyster Bay is deprived of 23.131% of the voting power to which it is entitled.